89-1043

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

WILLIAM W. HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit's holding that the jury should not be instructed on the issue of multiple conspiracies if, in the trial court's view, the evidence "clearly establishes the existence of a single conspiracy" is the proper standard for taking a factual issue away from the jury when "some evidence" of multiple conspiracies exists.

2. Whether the court of appeals erred in holding that an overt act was not an element of a Title 21 U.S.C. § 846 conspiracy.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Michael R. Davis was a party to the proceedings below. He is not a party in this Court.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
A. BACKGROUND FACTS	2
B. THE TRIAL IN THE DISTRICT COURT	2
C. THE COURT OF APPEALS PROCEEDING	4
1. Multiple Conspiracies	4
2. The Overt Act Requirement of a Title 21 U.S.C. § 846 Conspiracy	5
REASONS FOR GRANTING THE PETITION	5
A. MULTIPLE CONSPIRACIES	6
1. Protection of the Right to Jury Trial	6
2. The Court of Appeals Ignored Precedent of Other Circuits	8
B. OVERT ACT ELEMENT OF A § 846 CONSPIRACY	9
CONCLUSION	10
APPENDIX A	1a
APPENDIX B	19a
APPENDIX C	20a
APPENDIX D	21a

TABLE OF AUTHORITIES

Cases: Page

Baker v. United States, 855 F.2d 1353 (8th Cir. 1988) 5

Barks v. United States, 437 U.S. 1, 16 (1978) 7

Duncan v. Louisiana, 391 U.S. 145 (1968) 6

In Re Winship, 397 U.S. 358, 364 (1970) 7

Jackson v. Virginia, 443 U.S. 307, 316 (1979) 7

Rogers v. Missouri Pacific R.R. Company, 352 U.S. 500 (1957) 6

United States v. Andrade, 788 F.2d 521, 526 (8th Cir.) *cert. denied*, 107 S.Ct. 462 (1986) 9

United States v. Cambindo Valencia, 609 F.2d 603, 625 (2nd Cir. 1979) 6

United States v. Coros, 872 F.2d 805 (8th Cir. 1989) 5

United States v. Eubanks, 591 F.2d 513, 518 (9th Cir. 1979) 8

United States v. Melchor-Lopez, 627 F.2d 886, 890 (9th Cir. 1980) 9

United States v. Tavelman, 650 F.2d 1133, 1140 (9th Cir.) *cert. denied* 455 U.S. 939 (1982) 9

United States v. Varelli, 407 F.2d 735 (9th Cir. 1969) .....

United States v. Wolffs, 594 F.2d 77, 80 (5th Cir. 1979) 8

Statutes:

21 U.S.C. § 846 2,3

28 U.S.C. § 1254(1) 1

In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

WILLIAM W. HARRIS,

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v.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner William W. Harris respectfully petitions for a writ of certiorari to review the judgment of the United States court of appeals for the Eighth Circuit entered in this case on October 24, 1989.

OPINIONS BELOW

The opinion of the court of appeals is reported at 882 F.2d 1334 (8th Cir. 1989). (See Appendix A.) The judgment of the District Court is contained in Appendix D.

JURISDICTION

The judgment of the court of appeals was originally entered on August 22, 1989. Petitioner, however, did not receive notice of the entry of judgment or of the filing of the opinion; therefore, the court of appeals vacated and re-entered judgment on October 24, 1989. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Title 21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT

A. BACKGROUND FACTS

On May 17, 1988, William W. Harris was indicted for entering into a single conspiracy with Michael Davis, Rolando Soriano and Kareema Abduhl Jabber to distribute cocaine in violation of Title 21 U.S.C. § 846. The indictment claimed this conspiracy started in November of 1985 and continued until June 16, 1986. Mr. Harris was also charged with six counts of using a telephone to facilitate this conspiracy, one of which was dismissed before trial.

Michael Davis was named in the indictment with Mr. Harris under the conspiracy count and was also charged with drug possession in a separate count. Ms. Jabber was charged under the conspiracy count of the indictment with Mr. Harris and was named in a separate telephone count as well. Ms. Jabber later entered a plea agreement and became a witness for the Government at Mr. Harris' trial. (Jabber Testimony Tr. 3.)

Mr. Soriano was the key Government witness against Mr. Harris. He had been arrested on June 16, 1986 in California while in possession of drugs. (Soriano Testimony Tr. 159.) He entered a plea agreement with the Government whereby he agreed to testify to drug dealings in which he was involved. (Soriano Testimony Tr. 24–26.)

B. THE TRIAL IN THE DISTRICT COURT

On August 3, 1988, Mr. Harris was tried in the United States District Court for the Western District of Missouri with Mr. Davis for the charges in the indictment. At the end of

the trial, the Court instructed the jury on a single conspiracy beginning in November of 1985 and ending in June 1986. Mr. Harris requested a multiple conspiracy instruction based upon the evidence at trial. Mr. Harris also requested that the jury be instructed that a Title 21 U.S.C. § 846 conspiracy required an overt act as an element of the offense.

Evidence existed at trial from which a reasonable jury could have found the existence of two cocaine conspiracies. One conspiracy between Rolando Soriano and Michael Davis beginning in December of 1985 and ending some time between March and May of 1986 and another conspiracy between Mr. Harris and Mr. Soriano beginning some time in late April or May of 1986 and ending in June of 1986.

Mr. Soriano testified that in November of 1985 he distributed cocaine to Kansas City and that Mr. Davis was his, "number one man . . . in Kansas City." (Soriano Testimony Tr. 27, 28.) Mr. Soriano was the middle man between the Columbian cocaine outlet and Mr. Davis. He put "the Columbian *and Mike*" together (emphasis added). In return, Mr. Soriano received 50% of the profits from the sale of drugs. (Soriano Tr. 29.)

Mr. Soriano testified that as of March 31, 1986, "Mr. Harris, William Harris, like I say at that time he didn't have nothing to do with my business that I considered mine. Was just strictly Mike Davis at that point. The number one man." (Soriano Testimony Tr. 100, 98.) Mr. Soriano also testified that "Harris not even involved in the picture in this [cocaine dealings]" and that he was not even present when Mr. Davis and Mr. Soriano had cocaine dealings. (Soriano Testimony Tr. 58.) As late as March 31, Mr. Soriano was not even talking to Mr. Harris about the cocaine business. (Soriano Testimony Tr. 99.) Mr. Harris "was not even involved in the picture." (Soriano Testimony Tr. 58.)

Mr. Davis' relationship with Mr. Soriano ended some time around the end of March or in April of 1986. (Soriano

Testimony Tr. 107, 181.)[1] Mr. Soriano cut Mr. Davis' cocaine supply off. He ended his relationship with Mr. Davis and entered a new arrangement.

When Mr. Soriano's relationship with Mr. Davis ended, Mr. Harris, according to Mr. Soriano, became Mr. Soriano's man in Kansas City for cocaine distribution. (Soriano Testimony Tr. 107–160, 31–32.) Mr. Soriano stated at that point, "Harris was my only man here [Kansas City]." (Soriano Testimony Tr. 114, 115.)[2]

On June 16, 1988, Mr. Soriano was arrested delivering cocaine to an FBI agent in California. (Soriano Testimony Tr. 159.) After that he did not see or talk to Mr. Harris again. (Soriano Testimony Tr. 159.)

At the end of the trial, the court instructed the jury on a single conspiracy beginning in November of 1985 and ending in June of 1986. Mr. Harris requested that a multiple conspiracies instruction be given. The trial court refused. Mr. Harris also requested that the jury be instructed that a Title 21 U.S.C. § 846 conspiracy required an overt act as an element of the offense. The trial court refused.

C. THE COURT OF APPEALS PROCEEDING

1. *Multiple Conspiracies*

The Eighth Circuit affirmed the trial court's refusal to instruct the jury on multiple conspiracies. It stated: "Whether it was

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[1]The reason for the ending of Mr. Davis' relationship with Mr. Soriano was that Mr. Davis owed Mr. Soriano money. (Soriano Testimony Tr. 31–32, 114.) Mr. Davis' drinking was also a reason. (Soriano Testimony Tr. 31–32.) Mr. Davis generally appeared to be a bungler. He was arrested in possession of drugs (Soriano Testimony Tr. 60.) and his brother, Steven Davis, who Michael was using as a courier, was arrested while taking $100,000 of Mr. Soriano's money to Florida. (Soriano Testimony Tr. 50–55.)

[2]Even the trial court realized that the evidence indicated two separate conspiracies existed. After Mr. Soriano testified on direct, during Mr. Davis' attorney's cross-examination of Mr. Soriano, the trial court asked a question in order to clarify the time frame of the matter: "That was after you [Soriano] had quit dealing with him [Davis]." (Soriano Tr. 181.)

proper for the trial court to refuse to instruct the jury on multiple conspiracies . . . turns on what was shown by the evidence." (Appendix A, 11a.) The court of appeals then performed a detailed review of the evidence in this case. It weighed it and interpreted it. It came to the conclusion that the evidence at trial showed the existence of a single conspiracy, not the multiple conspiracies that Mr. Harris alleged existed.

The court held, citing its decision in *Baker v. United States*, 855 F.2d 1353 (8th Cir. 1988), that "a trial court does not commit error by refusing to give a multiple conspiracy instruction . . . when the evidence clearly establishes the existence of a single conspiracy." (Appendix A, 11a.)

This standard for taking the issue away from the jury is not correct. The court of appeals failed to acknowledge that the existence of multiple conspiracies is a fact question for the jury if some evidence of multiple conspiracies exists. In coming to its decision, the court of appeals ignored that it is the jury's function to determine what the evidence establishes, not the court's.

2. *The Overt Act Requirement of a Title 21 U.S.C. § 846 Conspiracy*

The Eighth Circuit acknowledged that in the past it had given "conflicting signals as to whether section 846 requires proof of an overt act," but held that it chose to follow its recent decision, *United States v. Covos*, 872 F.2d 805 (8th Cir. 1989) *petition for cert. filed* No. 88-7524 (June 19, 1989), which followed the "overwhelming weight of authority in other circuits" that section 846 does not require proof of an overt act. The court of appeals did not discuss the rationale of the decisions requiring an overt act.

REASONS FOR GRANTING THE PETITION

The decision of the Eighth Circuit presents legal issues of substantial practical importance on the subject of multiple conspiracies and the elements of a Title 21 U.S.C. § 846 conspiracy. These issues plainly warrant review by this court.

The court of appeals ignored the role of the jury in deciding issues of fact in affirming the trial court's refusal to instruct

the jury on the issue of multiple conspiracies. (Appendix A, 11a.) In so doing, the court of appeals ignored the precedent of other circuits recognizing that the question of the existence of multiple conspiracies should be submitted to the jury when it is possible for the jury to find multiple conspiracies. *United States v. Eubanks*, 591 F.2d 513, 518 (9th Cir. 1979); *United States v. Varelli*, 407 F.2d 735 (9th Cir. 1969); *See also United States v. Cambindo Valencia*, 609 F.2d 603, 625 (2nd Cir. 1979).

The court of appeals affirmance of the trial court's refusal to instruct the jury that an overt act is a requirement of Title 21 U.S.C. § 846 conspiracy is admittedly in accordance with the majority of circuits. (Appendix A, 13a.) However, the Ninth Circuit, in *United States v. Tavelman*, 650 F.2d 1133, 1140 (9th Cir.) *cert. denied* 455 U.S. 939 (1982) and *United States v. Melchor-Lopez*, 627 F.2d 886, 890 (9th Cir. 1980), recognizes that an overt act is an element of a § 846 conspiracy. This difference between the circuits must be reconciled by this Court.

A. MULTIPLE CONSPIRACIES

1. *Protection of the Right to Jury Trial*

This Court has always been vigilant in protecting the right to trial by jury. *See Duncan v. Louisiana*, 391 U.S. 145 (1968); *Rogers v. Missouri Pacific R.R. Company*, 352 U.S. 500 (1957). It has recognized that "trial by jury in criminal cases is fundamental to the American scheme of justice." *Duncan*, at 153–154. In this case, however, the court of appeals usurped the jury's role as the finder of fact in a criminal case by taking the issue of multiple conspiracies away from the jury under an incorrect standard and making the factual determination "that the evidence showed only one conspiracy" for itself. Thus, review by this Court is warranted in order to protect the petitioner's right to trial by jury.

In this case, the court of appeals held that a trial court can take the issue of multiple conspiracies away from the jury if, in the trial court's view, the evidence "clearly establishes the existence of a single conspiracy." (Appendix A, 11a.) This standard is without basis.

Admittedly, a trial court can make threshold determinations on whether sufficient evidence exists to submit an issue to the jury. For instance, in a criminal case, the court can take the issue of a defendant's guilt away from the jury on a motion for acquittal. Fed. R. Crim. Pro. 29. The standard that the court must follow on such a motion is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). The evidence is viewed in the light most favorable to the party opposing the motion, the government. *Burks v. United States*, 437 U.S. 1, 16 (1978).

If the court of appeals had applied this standard, by analogy, to the issue of submitting a multiple conspiracy instruction to the jury, formulating the standard to fit the situation as *whether any rational trier of fact could have found the existence of two conspiracies viewing the evidence in the light most favorable to the defendant*, it could not have sanctioned taking the multiple conspiracy issue away from the jury. It would not have determined for itself the existence of a single conspiracy. It would have reversed the trial court's decision. A rational trier of fact could have found multiple conspiracies viewing the evidence in the light most favorable to the Petitioner.

However, this formulation, while closer to an appropriate standard for taking the issue away from the jury than the "clearly established evidence" standard the court of appeals used, would have still have been incorrect because it would have failed to take into account the government's burden to prove guilt beyond a reasonable doubt. *See In Re Winship*, 397 U.S. 358, 364 (1970).

Unquestionably, the government must prove the existence of a single conspiracy beyond a reasonable doubt. If the defendant, however, produces some evidence of multiple conspiracies, he is entitled to an instruction on multiple conspiracies.

A review of the analysis of entrapment cases is helpful. Whether a defendant should be allowed to submit an entrapment question to the jury is initially a matter of law for the court. *United States v. Wolffs*, 594 F.2d 77, 80 (5th Cir. 1979). If the defendant produces "some evidence" which shows entrapment, the issue is submitted to the jury. *Id.* Furthermore, in making the initial determination, "the court must accept the testimony most favorable to the defendant." *Id.*

If the court of appeals had applied the "some evidence" standard, as it should have, it clearly would have found, viewing the evidence in the light most favorable to the defendant, that "some evidence" of multiple conspiracies existed. It would have determined that the trial court erred in failing to instruct the jury on multiple conspiracies.

No reason exists for a tougher standard than the "some evidence" standard in a multiple conspiracy case. The court of appeals' holding that a "trial court does not commit error by refusing to give a multiple conspiracy instruction . . . when the evidence clearly establishes the existence of a single conspiracy," usurps the jury's role and makes the court the finder of fact. The court of appeals' holding blatantly takes away petitioner's right to trial by jury.

2. *The Court of Appeals Ignored Precedent of Other Circuits*

The decision of the court of appeals ignored precedent of other circuits which applies the correct standard for submitting the multiple conspiracy issue to the jury.

In *United States v. Eubanks*, 591 F.2d 513, 518 (9th Cir. 1979), the court stated:

> *If it is possible*, under the evidence for the jury to find that multiple conspiracies existed then the court should instruct the jury on the issue . . . .The evidence here was sufficient to support the finding that a single conspiracy had occurred; *but it was also sufficient to warrant a jury instruction on the possibility of finding multiple conspiracies.*

> Based on the evidence produced at trial, the jury could have found that multiple conspiracies had taken place, rather than the single conspiracy charged in the indictment. Thus the trial judge should have instructed the jury on the multiple conspiracy issue. (Emphasis added.)

Id. at 518.

Even the Eighth Circuit recognizes that the issue of a single conspiracy versus multiple conspiracies is for the jury. In *United States v. Andrade*, 788 F.2d 521, 526 (8th Cir.) *cert. denied*, 107 S. Ct. 462 (1986) the court stated:

> Whether a scheme is one conspiracy or several is a jury question, since it is a question of fact as to the nature of the agreement.

Review by this Court is certainly warranted to protect the petitioner and other criminal defendants' rights to trial by jury and to reconcile the split between the Eighth Circuit and other circuits as to the proper standard for submitting the issue of multiple conspiracies to the jury.

B. OVERT ACT ELEMENT OF A § 846 CONSPIRACY

This Court has never directly addressed the issue of whether an overt act is a requirement of the Title 21 U.S.C. § 846 conspiracy. While the majority of circuits hold that an overt act is not an element of such a conspiracy, the Ninth Circuit in *United v. Melchor-Lopez*, 627 F.2d 886, 890 (9th Cir. 1980) and *United States v. Tavelman*, 650 F.2d 1133, 1140 (9th Cir.) *cert. denied* 455 U.S. 939 (1982) have held that an overt act is a necessary element of a § 846 conspiracy.

Conspiracy should not be punishable as a state of mind. It should become punishable only if completed by an overt act. If an overt act is not a requirement of the § 846 conspiracy, punishment of the state of mind is theoretically permissible. Surely, Congress did not intend such a result when enacting § 846. Furthermore, the very meaning of the word conspiracy under federal common law implies the requirement of an

overt act. A conspiracy is not a conspiracy unless an overt act exists.

Review by this Court of this important issue is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2454

United States of America,
Appellee,

v.

Michael R. Davis,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

No. 88-2532

United States of America,
Appellee,

v.

William W. Harris,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: March 14, 1989
Filed: August 22, 1989

Before JOHN R. GIBSON, Circuit Judge, HEANEY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

BOWMAN, Circuit Judge.

Michael R. Davis and William W. Harris appeal their convictions for drug-related offenses. After a jury trial, both appellants were convicted of conspiring to distribute cocaine, Davis was convicted of possession of cocaine with intent to distribute, and Harris was convicted of using a telephone in furtherance of a conspiracy to distribute cocaine. The District Court[1] entered judgment and imposed fines and prison sentences. We affirm.

I.

The Government's evidence at trial showed the existence of a cocaine conspiracy from November 1985 to approximately June 16, 1986 involving, along with other individuals, Davis, Harris, Marlene K. Fue, and Rolando Soriano.[2] In November 1985 Davis met with Soriano, a Los Angeles area drug dealer, and they agreed to work together to import cocaine into Kansas City. A scheme was set up in which Soriano supplied cocaine from Columbian drug sources to Davis, Davis distributed the cocaine to individuals in the Kansas City area, Harris served as a "mule," or courier of cash and cocaine, for Davis, and Fue was a "mule" for Davis and Harris.

The first cocaine transaction took place in December 1985. Davis flew to Miami, where he met with Soriano and a drug source named Oswaldo Avilas, and for $32,000 in cash he purchased one kilogram of cocaine. Later that month Davis sent Harris to Miami to negotiate a second deal, this one for ten kilograms of cocaine. Soriano did not want to deliver the cocaine to Harris, so he and his "mule," Marcos Rodriguez, drove the ten kilograms of cocaine to Kansas City and personally delivered the cocaine to Davis. For the ten kilograms of cocaine Davis was to pay Soriano $350,000.

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[1] The Honorable Scott O. Wright, Chief United States District Judge for the Western District of Missouri.

[2] Soriano was named in the superseding indictment as a coconspirator, but in exchange for serving as a Government witness was not prosecuted for offenses committed in the Western District of Missouri.

In February 1986 Soriano arranged a deal between Avilas and Davis for five kilograms of cocaine. For this transaction Davis had his brother, Stephen Davis, pick up the cocaine in New York and bring it to Kansas City. Afterward, Stephen Davis drove to Miami to pay $100,000 in cash to Soriano and his sources. Later that month Soriano returned to Kansas City to collect more money from Davis.

Another drug transaction between Soriano and Davis took place in March 1986, this one also involving five kilograms of cocaine. Delivery was made to Davis in Kansas City and, as usual, Soriano "fronted" the cocaine. Early in April 1986 Soriano returned again to Kansas City to collect money for cocaine he had supplied to Davis.

The final cocaine deal occurred in April 1986. This time Davis sent Harris to Los Angeles where Soriano delivered to Harris six kilograms of cocaine. Harris then transported the cocaine by car to Kansas City.

In late May 1986 Soriano again went to Kansas City to try to extract money from Davis. At a meeting involving Soriano, Davis, and Harris, Davis tried to excuse his failure to pay by saying that Harris and others had failed to pay what they owed him. Harris and Davis disagreed sharply over the amount of cocaine money Harris owed, Davis claiming around $100,000 and Harris saying it was more like $6,000. Apparently displeased with Davis's repeated failure to pay, Soriano told Davis to give Harris the cocaine remaining from the latest delivery so that Harris could sell it. Harris unsuccessfully attempted to arrange another cocaine transaction in June 1986.

Fue's role in the conspiracy primarily was to transport cash. During the latter weeks of the conspiracy, Fue made three trips to Miami to deliver money to Soriano and his Colombian sources on behalf of the appellants. Over the course of these trips, the last of which was May 29, 1986, Fue delivered, by her own estimate, over $100,000 in cash.

In the superseding indictment on which the case was tried, Davis, Harris, and Fue were charged in Count I with

conspiring with Soriano and others to possess and distribute cocaine, a violation of 21 U.S.C. §§ 841(a)(1) and 846 (1982). Davis was charged in Count II with possession of cocaine with intent to distribute, a violation of 21 U.S.C. § 841(a)(1). And Fue was charged in CountIII and Harris in Counts IV through IX with using a telephone in furtherance of a conspiracy to distribute cocaine, a violation of 21 U.S.C. § 843(b) (1982).[3]

On June 28, 1988 an evidentiary hearing was held before United States Magistrate Calvin K. Hamilton on Davis's motion to suppress statements and cocaine obtained by the police after he was stopped February 18, 1986 for a traffic violation. On July 18, 1988 Magistrate Hamilton filed a report in which he recommended that Davis's motion be denied. Magistrate Hamilton's Report and Recommendation, to which Davis filed no objections, was adopted in its entirety by the District Court in a July 29, 1988 order denying Davis's motion.[4]

On July 20, 1988 a hearing was held before Judge Bartlett on motions by Davis and Harris to suppress incriminating wiretap evidence. Both motions were denied.

The case went to trial August 1, 1988, and after a three-day trial the jury found Davis and Harris guilty as charged.[5] Davis and Harris appeal, separately briefing their arguments.

II.

A.

Davis first argues that cocaine seized from a car he was driving should not have been admitted into evidence at trial because the search leading to its discovery was unconstitutional.

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[3]Fue (a/k/a Karemah F. Abdul Jabbar) became a cooperating witness and pleaded guilty to the charge in Count III in exchange for having the conspiracy charge dropped.

[4]The July 29 order was issued by the Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

[5]Count IX, which pertained only to Harris, was dropped before trial.

The cocaine at issue was seized on the night of February 18, 1986, after Kansas City, Missouri police officers Vincent Cannon and Les Ramsey stopped Davis for speeding. When Officer Cannon discovered that Davis's license had been suspended and was to be revoked, Cannon informed Davis he was under arrest for driving without a valid license, and directed him to go the police car to speak with Officer Ramsey. There was no other person in the car Davis had been driving. Following standard local police procedure, Cannon determined the car would have to be towed and he proceeded to conduct an inventory search of the car. During the search Cannon spotted two paper bags on the passenger-side front floorboard. One bag was partially open and Cannon saw in it ammunition and a stack of twenty-dollar bills. He then opened the other bag and found a white substance he thought was cocaine. Believing at that point that he was dealing with more than a traffic offender, Cannon returned to the police car and handcuffed Davis. The white substance Officer Cannon found later proved to be cocaine and, after Davis's motion to suppress was denied, was admitted into evidence at trial.

Davis argues that his Fourth Amendment right to be free from unreasonable search and seizure was violated because the police searched the car without "probable cause." The argument is without merit. The search made by Officer Cannon was a routine inventory search incident to impoundment of a vehicle. This kind of search does not require a showing of probable cause. The probable-cause requirement is " 'peculiarly related to criminal investigations, not routine, noncriminal procedures.' " *Colorado v. Bertine*, 479 U.S. 367, 371 (1987) (quoting *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976). *See also United States v. Chadwick*, 433 U.S. 1, 10 n.5 (1977). The constitutional reasonableness of the search in this case must be determined on some basis other than probable cause.

To determine whether the search here was reasonable, we look first to the interests it served. The Supreme Court has emphasized that inventory searches further a number

of significant governmental interests. In *Bertine* the Court reviewed *Opperman* and *Illinois v. Lafayette*, 462 U.S. 640 (1983), in which it found inventory searches reasonable, and noted:

> [T]he governmental interests justifying the inventory searches in *Opperman* and *Lafayette* are nearly the same as those which obtain here. In each case, the police were potentially responsible for the property taken into their custody. By securing the property, the police protected the property from unauthorized interference. Knowledge of the precise nature of the property helped guard against claims of theft, vandalism, or negligence. Such knowledge also helped to avert any danger to police or others that may have been posed by the property.

Bertine, 479 U.S. at 372-73. The interests cited by the Court in *Bertine* were precisely served by the search in this case. The car was both a likely target for vandals and a potential source for subsequent dangerous and illegal activity. The car had been stopped in a high crime area, and as it turned out, lying on the front floorboard was a sack with a large stack of $20 bills and .25 caliber ammunition, and next to that was a bag containing more than 100 grams of cocaine.[6]

An inventory search is not constitutionally reasonable, however, merely because it serves important governmental interests. To pass constitutional muster, the search also must be conducted pursuant to standard police procedures. *See Bertine*, 479 U.S. at 376 (Blackmun, J., concurring). The trial court found that Officer Cannon conducted his search of the car and its contents in accordance with standard local police procedures.[7] Davis does not challenge this finding

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[6]There is no indication that Officer Cannon's inventory was "slipshod" so that it would not have protected the police against claims by Davis that his property had been lost or stolen. *See Bertine*, 479 U.S. at 383 (Marshall, J., dissenting).

[7]*See* Report and Recommendation at 5, 7-8, 12, which, as we previously noted, the District Court accepted in its entirety. *See supra* p. 4 & n.4. We note that the Supreme Court has said that if standard police procedures

except to argue that because the police could have chosen alternatives to impounding the car,[7] the procedures taken were not "standard." In other words, the search was unconstitutional, according to Davis, because police department regulations gave the officers discretion to choose between impoundment and other methods of safekeeping the property. The Supreme Court, however, has rejected this argument, stating that police discretion of this sort is not prohibited "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *Bertine*, 479 U.S. at 375. There is no suggestion that the police in this case did not exercise discretion according to standard criteria or that they were prompted by an investigatory motive.

Davis further contends that because available alternatives were less intrusive, the police were obliged to offer to use them. Like the preceding argument, this argument too was rejected in *Bertine*. The Court there said that "while giving [the arrestee] an opportunity to make alternate arrangements would undoubtedly have been possible, . . . '[t]he real question is not what "could have been achieved," but whether the Fourth Amendment *requires* such steps . . . .'" 479 U.S. at 374 (quoting *Lafayette*, 462 U.S. at 647) (emphasis in *Lafayette*). The Court concluded that when "reasonable police regulations relating to inventory procedures [are] administered in good faith" and "according to standardized criteria," the Fourth Amendment is satisfied. *Bertine*, 479 U.S. at 374 & n.6. We are presented with no persuasive reason for finding the inventory search in this case unconstitutional.[8]

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so mandate, the scope of an inventory search of an impounded vehicle and its contents may extend to the opening of closed containers. *See Bertine*, 479 U.S. at 374 n.6.

[7] Davis asserts, for example, that he could have been offered the opportunity to make other arrangements for the safekeeping of his property or could have waived his right to seek redress for loss or damage to the car and its contents.

[8] The District Court also found that the search was constitutional as incident to an arrest. *See* Report and Recommendation at 7. Because we find the search constitutional on other grounds, we need not address that issue.

B.

Davis next makes a number of joinder and severance arguments. The issues raised by these arguments are governed by Federal Rules of Criminal Procedure 8 and 14.[10]

Davis argues that the trial court violated Rules 8(b) and 14 by refusing to sever his trial from that of Harris. Rule 8(b) permits joinder of two or more defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." This Court's discussions of Rule 8(b) make clear that when an indictment charges the defendants with involvement in a single common conspiracy, joinder of those defendants under Rule 8(b) is proper. *See, e.g., United States v. Mendoza*, 876 F.2d 639, 643 (8th Cir. 1989). The superseding indictment in this case charges Davis and Harris with

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[10]Rule 8 provides:

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

involvement in a single common conspiracy to possess and distribute cocaine. Thus, the initial joinder was proper.

Davis further argues that even if joinder was proper under Rule 8(b), the District Court should have granted him a severance under Rule 14. Rule 14 allows the trial court to order severance even though joinder is proper under Rule 8(b) if the defendant or government appears to be prejudiced by the joinder. The decision to sever lies in the trial court's discretion and we will not find the refusal to sever an abuse of discretion absent a showing of "real prejudice." *United States v. Adkins*, 842 F.2d 210, 212 (8th Cir. 1988). *See United States v. Garcia*, 785 F.2d 214, 220 (8th Cir.) ("Appellants must show that the denial of severance clearly and actually prejudiced them."), *cert. denied*, 475 U.S. 1143 (1986).

Davis argues that he should have been given a separate trial under Rule 14 because the quantity of evidence against Harris was greater than that against him. Assuming that more incriminating evidence was presented against Harris than Davis, an assumption of doubtful validity, this is not in itself a basis for finding that the trials should have been severed. "Severance is not required merely because the evidence against one defendant is more damaging than the evidence against another. 'Severance becomes necessary where the proof is such that a jury could not be expected to compartmentalize the evidence as it relates to separate defendants.'" *United States v. Faul*, 748 F.2d 1204, 1217 (8th Cir. 1984) (quoting *United States v. Jackson*, 549 F.2d 517, 523 (8th Cir.), *cert. denied*, 430 U.S. 985 (1977)), *cert. denied*, 472 U.S. 1027 (1985). Davis makes no showing and we find no indication that the jurors were unable to properly compartmentalize the evidence. In fact, the danger of a spillover of evidence in this case was minimal. The trial took only three days, it did not involve complex issues, and there were only two defendants and eight counts. In such a case a jury undoubtedly is capable of properly compartmentalizing the evidence. *See United States v. O'Connell*, 841 F.2d 1408, 1432 (8th Cir.), *cert. denied*,

108 S. Ct. 2857 (1988), 109 S. Ct. 799 (1989); United States v. Andrade, 788 F.2d 521, 530 (8th Cir.), *cert. denied*, 479 U.S. 963 (1986).

We also reject Davis's claim that he should have been given a separate trial under Rule 14 because he and Harris had conflicting defenses. To succeed under this claim, Davis at least must show that the defenses were irreconcilable. *United States v. Robinson*, 774 F.2d 261, 267 (8th Cir. 1985). He makes no such showing. All he offers in support of his claim is the bare assertion that conflicting defenses existed. The mere existence of generally antagonistic defenses does not require severance, and Davis's assertion "standing alone does not affirmatively demonstrate any prejudice requiring reversal." *Faul*, 748 F.2d at 1217. In sum, we perceive here no basis for departing from the general rule that individuals charged in a conspiracy should be tried jointly. *See United States v. Baker*, 855 F.2d 1353, 1357 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 2072 (1989).

Davis also argues that there was misjoinder of offenses. He contends that Count I should not have been joined with the other counts because there are no allegations in those counts "that they are part of the same series of acts or transactions as the conspiracy . . . alleged in Count I." Brief for Davis at 17. This Court has said, however, that for joinder of counts not brought against each defendant to be proper it may be sufficient for the indictment to allege "other facts" that "at least suggest the existence of an overall scheme encompassing all the defendants and all the charged offenses." *United States v. Bledsoe*, 674 F.2d 647, 656-57 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982).

The superseding indictment in this case alleges facts which suggest that Counts II and IV through VIII arose out of the conspiracy charged in Count I. Davis and Harris are charged in Count I with conspiring "to distribute and to possess with intent to distribute cocaine." Davis is then charged in Count II with possession with intent to distribute cocaine, a

substantive offense that is an objective of the conspiracy. In Counts IV through VIII Harris is charged with using a telephone to facilitate a conspiracy to distribute cocaine, likely concomitant offenses to that charged in Count I. Each of the offenses in Counts II and IV through VIII is alleged to have taken place during the existence of the charged conspiracy.

Furthermore, Federal Rule of Criminal Procedure 52(a), the harmless error rule, applies to claims of misjoinder. *United States v. Lane*, 474 U.S. 438 (1986). Thus, misjoinder results in prejudice requiring reversal only when it has had a " 'substantial and injurious effect or influence in determining the jury's verdict.' " *Lane*, 474 U.S. at 449 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Here, Davis makes no showing that the alleged misjoinder had a "substantial influence" on the verdict. Considering the overwhelming evidence of Davis's guilt and the likelihood that evidence on Count I would have been admissible anyway in a separate trial on Count II, and vice-versa, we conclude that even if the counts were misjoined (and we do not think they were) the error was harmless. *See Lane*, 474 U.S. at 449.

III.

A.

Harris first claims that the trial court erred by refusing to instruct the jury on multiple conspiracies. A trial court does not commit error by refusing to give a multiple conspiracy instruction, however, when the evidence clearly establishes the existence of a single conspiracy. *See Baker*, 855 F.2d at 1357. As explained in a note to this Circuit's Model Criminal Jury Instructions, when "the evidence substantially points to a single conspiracy, or [when] the evidence is not sufficient to permit a fair inference of multiple conspiracies, no instruction on multiple conspiracies should be given." Model Criminal Jury Instructions for the Eighth Circuit § 8.01, n.6 (rev. ed. Jan. 1989) (citations omitted). *See Baker*, 855 F.2d at 1356-57; *United States v. Kirk*, 534 F.2d 1262, 1269 (8th Cir. 1976), *cert. denied*, 430 U.S. 906, 433 U.S. 907 (1977). Whether it was proper for the trial court to refuse to instruct the jury

on multiple conspiracies thus turns on what was shown by the evidence.

Harris asserts that "[t]he evidence at trial clearly indicated the existence of two cocaine conspiracies," one between Soriano and Davis beginning in December 1985 and ending "some time between March and May of 1986," and the other between himself and Soriano beginning in "late April or May of 1986" and ending in June 1986. Brief for Harris at 6. We disagree. We find that the evidence showed only one conspiracy.

A single conspiracy is composed of individuals sharing common purposes or objectives under one general agreement. *See United States v. Spector*, 793 F.2d 932, 935-36 (8th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). As indicated in Part I *supra*, the evidence at trial showed one overall agreement among Soriano, Davis, and Harris to import cocaine into Kansas City for distribution. Soriano served as the source of the drug, Davis was Soriano's "contact" in Kansas City, and Harris was Davis's "mule." It is true that eventually, as Davis repeatedly failed to pay Soriano, relations between Soriano and Davis cooled, and Soriano dealt more directly with Harris. But, contrary to what Harris asserts, this hardly means that the scheme that had started in November 1985 ended and a new conspiracy began. At no relevant time was the objective of the scheme as originally agreed to completed, abandoned, renounced, or otherwise terminated; Harris and Soriano simply continued, albeit in closer association, their longstanding efforts to bring cocaine to Kansas City. Harris, in fact, continued to try to pay Soriano for cocaine delivered earlier in the conspiracy. Furthermore, even if Davis eventually quit the conspiracy, his departure did not necessarily signal the beginning of a new conspiracy between Harris and Soriano, for coconspirators may quit a scheme without leaving in their wake a new conspiracy among the remaining coconspirators. *See Garcia*, 785 F.2d 225. The evidence of changes in the coconspirators' roles in this case, rather than suggesting the existence of a new conspiracy, clearly showed only

"the various phases of one basic and overriding plan." *United States v. Wilson*, 497 F.2d 602, 605 (8th Cir.), *cert. denied*, 419 U.S. 1069 (1974).

The evidence overwhelmingly established the existence of a single conspiracy, and thus the District Court did not err in refusing to give an instruction on multiple conspiracies. *See Baker*, 855 F.2d at 1357.[11]

B.

Harris next argues that the District Court erred in failing to instruct the jury that an overt act is an essential element of proof under 21 U.S.C. § 846. In the recent case of *United States v. Covos*, 872 F.2d 805 (8th Cir. 1989), *petition for cert. filed*, No. 88-7524 (June 19, 1989), this Court acknowledged that decisions in this Circuit have given conflicting signals as to whether section 846 requires proof of an overt act. The Court went on to say that the more persuasive reasoning, as well as the "overwhelming weight of authority in other circuits," is that section 846 does not require proof of an overt act, and it chose to follow those decisions in this Circuit so holding. *Covos*, 872 F.2d at 809-10. *Covos* relects our view of the law and, accordingly, we reject Harris's argument. *See* Model Criminal Jury Instructions for the Eighth Circuit, § 8.01 n.3 (rev. ed. Jan. 1989) (under 21 U.S.C. § 846 "there is no requirement of an overt act").

C.

Harris also claims that the trial court erred by admitting irrelevant and highly prejudicial evidence. Specifically, he contends that it was error to admit Soriano's testimony that he had offered Harris a gun and marijuana and Fue's testimony that she and Harris had used cocaine.

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[11]Our holding forecloses Harris's argument that, because the Government failed to prove a single conspiracy, he should have been acquitted on Counts I and IV through VIII.

The trial court exercises "considerable discretion" in determining the evidence to be admitted, *United States v. Lewis*, 759 F.2d 1316, 1336 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985), and that discretion is particularly broad in a conspiracy trial. *Baker*, 855 F.2d at 1358. In admitting the evidence at issue here the trial court acted well within its discretion.

The testimony Harris objects to was neither irrelevant nor unduly prejudicial. Soriano's testimony about his offer to provide Harris with a gun and marijuana was probative evidence of the alleged conspiracy because it showed Soriano attempting to collect money owed from earlier cocaine sales and to keep Harris as a cocaine buyer. As Soriano testified, the marijuana was offered to "lure" Harris to pay for previous deliveries of cocaine and the gun was offered to "keep Harris happy." I Tr. at 115. Similarly, Fue's testimony that she and Harris had used cocaine was evidence that Harris was in possession of cocaine in April 1986 while en route from Los Angeles to Kansas City and thus was probative of the Government's claim that in April 1986 Harris obtained cocaine from Soriano in Los Angeles and transported it back to Kansas City. The testimony concerning the weapon and other drug-related activities was probative evidence and was properly admitted. *See Baker*, 855 F.2d at 1358.

IV.

Finally, both appellants object to the admission into evidence of recorded conversations obtained through a wiretap placed by federal law enforcement officers in the home of Soriano. The initial authorization for the wiretap became effective in March 1986, and the following May an order for continued interception was issued. Davis claims there was neither probable cause nor sufficient need for the wiretap, as required by 18 U.S.C. § 2518(3) (1982 & Supp. V 1987), and that he was not given notice of the wiretap, as required by 18 U.S.C. § 2518(8)(d) (1982 & Supp. V 1987). Harris claims there was not sufficient need for the wiretap extension. We conclude that these claims are without merit.

After a pretrial suppression hearing, the District Court concluded that the wiretap order was supported by probable cause. This is a finding of fact, which we will not reverse unless clearly erroneous. *United States v. Leisure*, 844 F.2d 1347, 1355 (8th Cir.), *cert. denied*, 109 S. Ct. 324, 403 (1988). After thoroughly reviewing the record, we agree there was probable cause. Davis makes no claim that the affidavits filed in support of the wiretap applications were unreliable or that the information set forth in them is inaccurate or false. His claim seems to be that they did not supply sufficient information. An affidavit provides ample information to establish probable cause if it presents facts and circumstances that, when viewed in their totality, support a "reasonable belief" that by employing the wiretap incriminating evidence against the target of the investigation will be obtained. *See Leisure*, 844 F.2d at 1354; 18 U.S.C. § 2518(3)(a), (b) & (d). Almost eighty pages in the first wiretap application affidavit and approximately seventy pages in the second are devoted to setting forth facts and circumstances indicating that evidence of criminal conduct would be obtained by a wiretap. The affidavits contained ample information.

Similarly, we reject Davis's assertion that there was not sufficient need for the wiretap. This too is an issue of fact subject to the clearly erroneous standard of review. *Garcia*, 785 F.2d at 223. "Judicial officers may authorize interception of wire communications if they find that 'normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.' " *United States v. Jones*, 801 F.2d 304, 314 (8th Cir. 1986)(quoting 18 U.S.C. § 2518(3)(c)). The affidavit filed with the initial wiretap application explains at length why traditional investigative techniques had failed to provide needed information or were too dangerous or unlikely to succeed if tried, citing, for example, the difficulty of placing undercover agents into the conspiracy, the ineffectiveness of physical surveillance, the surreptitious conduct of the coconspirators, the danger posed to confidential informants and the limited utility of toll records, financial statements,

and pen registers. The requirements of section 2518(3)(c) were met here. *See Jones*, 801 F.2d at 314-15; *United States v. Daly*, 535 F.2d 434, 438-39 (8th Cir. 1976).[12]

We also reject Davis's claim that the evidence should have been suppressed because he did not receive notice, as required by 18 U.S.C. § 2518(8)(d), that his conversations had been intercepted.[13] Failure to meet the notice requirement of section 2518(8)(d) does not render "unlawful an intercept order that in all other respects satisfies the statutory requirements." *United States v. Donovan*, 429 U.S. 413, 434 (1977). *See United States v. Barletta*, 565 F.2d 985, 991 (8th Cir. 1977). Congress did not intend postintercept notice "to serve as an independent restraint on resort to the wiretap procedure." *Donovan*, 429 U.S. at 439. Moreover, in preparing for trial Davis apparently had full access to all of the recorded calls and their transcripts and he has failed to show, or even argue, that in failing to properly notify him the government acted in bad faith or that failure to receive the notice caused him prejudice. *See Donovan*, 429 U.S. at 439 n.26; *Barletta*, 565 F.2d at 991; *United States v. Rizzo*, 492 F.2d 443, 447 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974). In short, Davis presents no legitimate basis for excluding the wiretap evidence.

Harris claims that, with regard to the wiretap extension application, "[t]he Government failed to comply with the requirement of 18 U.S.C. § 2518 that normal investigation procedures have been tried and have failed before resort to wiretaps is made." Brief for Harris at 16. Harris's argument here is premised on his assertion that "after the first wire interception was concluded, a new investigation began." *Id.* at 18.

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[12]Special Agent Donovan J. Leighton's trial testimony that before the wiretap began the government already had enough evidence to establish that Soriano had committed "crimes," I Tr. at 18, hardly shows that the government had obtained evidence against Soriano's coconspirators or evidence of the extent of Soriano's drug-trafficking operations.

[13]Notice was mailed, though apparently never received, thirty-four days after the ninety-day statutory period.

He contends that "[t]he first investigation involved the attempt to obtain evidence concerning the source of Soriano's cocaine and heroin," an "upstream investigation," but that later a "new" investigation was initiated, focusing on the distribution by Soriano of drugs to persons "downstream." *Id.* at 17-18.

As did the District Court, we reject Harris's contention that there were two investigations, one "upstream" and the other "downstream." The March application indicated that the purpose of the wiretap was to obtain information against Soriano "and others" who were believed to be *inter alia* "*distributing* and *possessing with intent to distribute* cocaine." Application at 3 (emphasis added). Further, the affidavit filed in support of the application states that "the communications to be intercepted will concern the dates, times, places, and method of importing, *distributing*, *selling*, possessing, concealing, and *delivering* controlled substances." Affidavit at 7 (emphasis added), and that the investigation is intended "to develop the evidence necessary to determine the *full scope of the criminal conspiracy*, the identities of *all the co-conspirators*, and the various methods utilized to import and *distribute* heroin and cocaine." *Id.* at 94 (emphasis added). Obtaining evidence of both "upstream" and "downstream" drug trafficking was, as affiant Special Agent Donovan J. Leighton testified (*see* Transcript of Pretrial Suppression Hearing at 21, 36), the objective of the investigation from the outset. Moreover, the affidavit filed in support of the May wiretap application stated that although the initial wiretap had provided some information, further interception remained necessary because of the deficiencies of alternative investigative techniques, as explained in the earlier affidavit.

Harris also suggested at oral argument that he was attacking the wiretap extension application under 18 U.S.C. § 2518(1)(c), which requires that a wiretap application contain a "full and complete statement" of the need for the wiretap, and that under *United States v. Brone*, 792 F.2d 1504, 1506 (9th Cir.

1986), we are to review the sufficiency of the application in this regard *de novo*. It is not clear that this issue was raised in the District Court, and therefore it may not be properly before us. Assuming, however, that it is, we reject it. Even applying a *de novo* standard of review, we have no difficulty in concluding that the application fully satisfied the requirements of section 2518(1)(c).

This is not a close case. The facts here are much like those involved in *Daly*. The illicit operation placed heavy reliance on telephones, the participants communicated through specialized jargon, and there was a marked distrust of confederates and significant danger posed to investigators. As in *Daly*, these and other factors "rendered normal investigative techniques impractical," and presented "a classic instance where electronic eavesdropping was reasonable and necessary." *Daly*, 535 F.2d at 439.

V.

We have carefully considered the merits of each of the appellants' arguments, except for Davis's claims in his pro se brief that he was denied effective assistance of counsel and received an illegal sentence,[11] and conclude that appellants have not shown any basis for the reversal of their convictions. The judgments of the District Court are AFFIRMED.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

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[11]These claims are not properly before us. If they are to be made, Davis's claim of ineffective assistance of counsel should be raised in the District Court in a motion made pursuant to 28 U.S.C. § 2255, not in this direct appeal, *see United States v. Gray*, 464 F.2d 632, 634 n.1 (8th Cir. 1972), and his claim that he received an illegal sentence likewise should first be raised in the sentencing court. *See Winston v. Mustain*, 562 F.2d 565, 566 (8th Cir. 1977). We point out that Davis's penalty is governed by the pre-November 1, 1987 sentencing law, not by the Sentencing Guidelines.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2532-WM

United States of America, *Appellee,*	*	
vs.	*	Appeal from the United States District Court for the Western District of Missouri.
William W. Harris, *Appellant.*	*	

The mandate of this Court which was issued in No. 88-2532 September 22, 1989 is hereby recalled. The Clerk of this Court is directed to vacate the judgment of this Court which was originally issued on August 22, 1989 in No. 88-2532 and immediately thereafter reissue the judgment of the Court in conformity with the opinion of this Court which was issued on August 22, 1989. All parties shall be promptly notified of this action by the Clerk of Court.

October 24, 1989

Order entered at the Direction of the Court:

Robert D. St. Vrain

Clerk, United States Court of Appeals, Eighth Circuit.

APPENDIX C

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No.

WILLIAM W. HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the District Court, briefs of the parties and was argued by counsel. After consideration, it is hereby ORDERED and ADJUDGED that the judgment of the District Court in this cause be affirmed in accordance with the opinion of this Court filed on August 22, 1989 and the separate order entered on this date.

Stamped: Order entered at the direction of the Court.

October 24, 1989

APPENDIX D

AO 245 (Rev. 8/87) Judgment in a Criminal Case

United States District Court

WESTERN DISTRICT OF MISSOURI

United States of America,
v.
WILLIAM W. HARRIS
1748 Michigan
Kansas City, MO 64128
(Name and Address of Defendant)

JUDGMENT IN A CRIMINAL CASE
Case Number:
88-00105-02-CR-W-5
Charles W. Gordon, Jr.
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:
[☐ guilty ☐ nolo contendere] as to count(s) _____, and
☐ not guilty as to count(s) _____.

THERE WAS A:
[☐ finding ☒ verdict] of guilty as to
count(s) 1, 4, 5, 6, 7, and 8.

THERE WAS A:
[☐ finding ☐ verdict] of not guilty as to
count(s) _____.
☐ judgment of acquittal as to count(s) _____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: knowingly, willfully and intentionally conspiring to distribute and to possess with intent to distribute a controlled substance, to wit: cocaine, a Schedule II controlled substance; and knowingly and intentionally using a communication facility, that is, a telephone, in the commission of a crime; all in violation of 21 U.S.C. § 846 and § 843(b). (Nov. 1985–June 1986)

IT IS THE JUDGMENT OF THIS COURT THAT: On Count 1 the defendant is committed to the custody of the Attorney General of the United States or his authorized representative for a term of fifteen (15) years, with parole to be governed by 18 U.S.C. § 4205(a), and a mandatory special assessment of fifty (50) dollars.

IT IS FURTHER ORDERED that on Count 2 the defendant is committed to the custody of the Attorney General for a term of four (4) years, to run consecutive to the sentence on Count 1, parole to be governed by 18 U.S.C. § 4205(a), and a mandatory special assessment of fifty (50) dollars.

IT IS FURTHER ORDERED that on Counts 5, 6, 7 and 8 the defendant is committed to the custody of the Attorney for one (1) year on each count, said sentences to run concurrently with each other and consecutively with sentences imposed on Counts 1 and 4, parole to be governed by 18 U.S.C. § 4205(a), and a mandatory special assessment of fifty (50) dollars.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $300.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 1, 4, 5, 6, 7, and 8 as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

[X] The Court orders commitment to the custody of the Attorney General and recommends: the United States Penitentiary at Leavenworth, Kansas.

September 29, 1988

Date of Imposition of Sentence

Scott O. Wright

Signature of Judicial Officer

SCOTT O. WRIGHT, Chief Judge

Name and Title of Judicial Officer

_____

Date

I HEREBY ATTEST AND CERTIFY ON 9/29/88
THAT THE FOREGOING DOCUMENT IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE AND IN MY LEGAL CUSTODY.

R. F. CONNOR
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

BY *Phyllis Travers* DEPUTY

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date

_____,

the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

Supreme Court, U.S.
FILED
FEB 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1043

In the Supreme Court of the United States

OCTOBER TERM, 1989

WILLIAM W. HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a jury instruction on multiple conspiracies.

2. Whether an overt act is an essential element of a drug conspiracy punishable under 21 U.S.C. 846.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Ewing v. *United States*, 386 F.2d 10 (9th Cir. 1967), cert. denied, 390 U.S. 991 (1968)	10
Hogan v. *O'Neill*, 255 U.S. 52 (1921)	9
Hopkins v. *United States*, 405 F.2d 770 (9th Cir. 1969)	10
Leyvas v. *United States*, 371 F.2d 714 (9th Cir. 1967)	10
Nash v. *United States*, 229 U.S. 373 (1913)	9
Singer v. *United States*, 323 U.S. 338 (1945)	9
United States v. *Bey*, 736 F.2d 891 (3d Cir. 1984)	8, 9
United States v. *Burrenson*, 643 F.2d 1344 (9th Cir.), cert. denied, 454 U.S. 830 (1981)	7
United States v. *Covos*, 872 F.2d 805 (8th Cir.), cert. denied, 110 S.Ct. 124 (1989)	5, 10
United States v. *DeJesus*, 520 F.2d 298 (1st Cir.), cert. denied, 423 U.S. 865 (1975)	9
United States v. *Dempsey*, 733 F.2d 392 (6th Cir.), cert. denied, 469 U.S. 983 (1984)	8, 9, 10
United States v. *Knuckles*, 581 F.2d 305 (2d Cir.), cert. denied, 439 U.S. 986 (1978)	8
United States v. *Linn*, 862 F.2d 735 (9th Cir. 1988)	6
United States v. *Martino*, 664 F.2d 860 (2d Cir. 1981), cert. denied, 458 U.S. 1110 (1982)	6
United States v. *Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980)	9
United States v. *Murray*, 492 F.2d 178 (9th Cir. 1973), cert. denied, 419 U.S. 854 (1974)	10

Cases—Continued: Page

United States v. *Pumphrey*, 831 F.2d 307 (D.C. Cir. 1987) 8
United States v. *Rodriguez*, 612 F.2d 906 (5th Cir. 1980), aff'd, 450 U.S. 333 (1981) 8, 10
United States v. *Russell*, 703 F.2d 1243 (11th Cir. 1983) 8
United States v. *Savaiano*, 843 F.2d 1280 (10th Cir.), cert. denied, 109 S. Ct. 99 (1988) 8, 10
United States v. *Tavelman*, 650 F.2d 1133 (9th Cir.), cert. denied, 455 U.S. 939 (1982) 9, 10
United States v. *Umentum*, 547 F.2d 987 (7th Cir. 1976), cert. denied, 430 U.S. 983 (1977) 8-9
United States v. *Wilkinson*, 754 F.2d 1427 (2d Cir.), cert. denied, 472 U.S. 1019 (1985) 6

Statutes:

Travel Act, 18 U.S.C. 1952 10
18 U.S.C. 371 9
21 U.S.C. 846 ..... 2, 4, 5, 8, 9, 10
21 U.S.C. 843(b) 2

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1043

WILLIAM W. HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 882 F.2d 1334.

JURISDICTION

The judgment of the court of appeals was originally entered on August 22, 1989, but it was vacated and reentered on October 24, 1989 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on December 23, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on one count of conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and five counts of using a telephone to facilitate the conspiracy, in violation of 21 U.S.C. 843(b). He was sentenced to 20 years' imprisonment. Pet. App. 21a-24a.

1. The evidence at trial, which is summarized in the opinion of the court of appeals, showed that petitioner, co-defendant Michael Davis, Rolando Soriano, and other individuals conspired with one another to distribute cocaine. The conspiracy began in November 1985 when Davis and Soriano, a Los Angeles drug dealer, met and agreed to work together to import cocaine into Kansas City, Missouri. Soriano supplied cocaine from Colombian drug sources to Davis, who distributed the cocaine to individuals in the Kansas City area. Petitioner served as a "mule" or courier of cash and cocaine for Davis. Pet. App. 2a.

In December 1985, Davis met with Soriano and a drug source named Oswaldo Avilas in Miami, and purchased one kilogram of cocaine for $32,000 in cash. Later that month, Davis sent petitioner to Miami to negotiate a purchase of ten kilograms of cocaine, but Soriano was unwilling to entrust the cocaine to petitioner. Accordingly, Soriano and his "mule," Marcos Rodriguez, drove the cocaine from Miami to Kansas City and delivered it to Davis. Davis was to pay Soriano $350,000 for this cocaine. Pet. App. 2a; Gov't C.A. Br. 14-15.

In February 1986, Soriano arranged another deal between Davis and Avilas for five kilograms of cocaine. Davis's brother was sent to New York to pick up the cocaine and bring it back to Kansas City. Shortly thereafter, the brother drove to Miami with cash intended for Soriano and his sources. Before he could deliver the money, however, Davis's brother was arrested for speeding. The cash impounded from the car, although returned to Davis, was less than the amount believed to have been sent, and there thus arose a shortfall with respect to the transaction. Later that month, Soriano returned to Kansas City to collect money from Davis. Pet. App. 3a; Gov't C.A. Br. 15.

Davis received another delivery of five kilograms of cocaine from Soriano in March 1986. Early in April 1986, Soriano went to Kansas City, where he met with Davis and petitioner and tried to collect money for the cocaine. Later in April 1986, Davis purchased another six kilograms of cocaine from Soriano. Petitioner met Soriano in Los Angeles to take delivery of the cocaine, and he then transported it back to Kansas City by car. Pet. App. 3a; Gov't C.A. Br. 16.

Davis continued to owe money to Soriano for cocaine that had been delivered. Consequently, during May, another one of Davis's "mules," Marlene Fue, made three trips to Miami to transport more than $100,000 in cash to Soriano. Petitioner accompanied Fue on her first trip, and, on another occasion, he provided Fue with money to be delivered to Soriano. Pet. App. 3a; Gov't C.A. Br. 17, 30.

In late May 1986, Soriano came to Kansas City to try to collect more money from Davis for the co-

caine deliveries. By that time, Soriano had become disenchanted with Davis because of his repeated failures to make full payment for his cocaine purchases. During a meeting at which Soriano, Davis, and petitioner were present, Davis excused his failure to pay Soriano on the grounds that petitioner and others had failed to pay him. Petitioner and Davis disagreed sharply over the amount of money petitioner owed Davis. Displeased with Davis's repeated failures to pay, Soriano told Davis to give petitioner the remaining cocaine to sell. Petitioner attempted to arrange another cocaine purchase in June 1986, but Soriano was arrested before the deal was completed. Pet. App. 3a; Gov't C.A. Br. 17, 30.

2. The superseding indictment charged that petitioner, Davis, Soriano, and others conspired to distribute cocaine and to possess cocaine with intent to distribute it from November 1985 until June 16, 1986. At trial, petitioner requested an instruction on the distinction between single and multiple conspiracies. He argued that the evidence showed one conspiracy between Soriano and Davis beginning in December 1985 and ending some time between March and May 1986 and another separate conspiracy between himself and Soriano beginning in late April or May 1986 and ending in June 1986. The district court denied the request for a multiple conspiracy instruction.

Petitioner also requested a jury instruction that the performance of an overt act in furtherance of a drug conspiracy is an element of a violation of 21 U.S.C. 846. The district court also refused to deliver that requested instruction.

3. The court of appeals affirmed. Pet. App. 1a-18a. It rejected petitioner's contention that he was

entitled to a multiple conspiracy instruction, explaining that "when 'the evidence substantially points to a single conspiracy, or [when] the evidence is not sufficient to permit a fair inference of multiple conspiracies, no instruction on multiple conspiracies should be given.'" *Id.* at 11a. In this case, the court found, "the evidence at trial showed one overall agreement among Soriano, Davis and [petitioner] to import cocaine into Kansas City for distribution." *Id.* at 12a. The court acknowledged that the evidence showed that, "as Davis repeatedly failed to pay Soriano, relations between Soriano and Davis cooled, and Soriano dealt more directly with [petitioner]." The court emphasized, however, that the "changes in the coconspirators' roles in this case, rather than suggesting the existence of a new conspiracy, clearly showed only 'the various phases of one basic and overriding plan.'" *Id.* at 12a-13a. The court concluded that "the evidence overwhelmingly established the existence of a single conspiracy." *Id.* at 13a.

The court also rejected petitioner's contention that the district court erred in failing to instruct the jury that an overt act is an essential element of a violation of 21 U.S.C. 846. The court adhered to its decision in *United States* v. *Covos*, 872 F.2d 805 (8th Cir.), cert. denied, 110 S. Ct. 124 (1989); in that case, the court had concluded "that the more persuasive reasoning, as well as the 'overwhelming weight of authority in other circuits,' is that section 846 does not require proof of an overt act." Pet. App. 13a.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the court of appeals applied an incorrect standard when it assessed whether the evidence was sufficient to justify a jury instruction on multiple conspiracies.

An instruction on multiple conspiracies is required when the indictment charges several defendants with one overall conspiracy but the jury could reasonably conclude from the evidence at trial that some of the defendants were involved only in a separate conspiracy unrelated to the single conspiracy charged in the indictment. As the court of appeals observed, such an instruction need not be given "when 'the evidence substantially points to a single conspiracy, or [when] the evidence is not sufficient to permit a fair inference of multiple conspiracies.'" Pet. App. 11a. The court of appeals held that the district court had properly declined to instruct on the issue of multiple conspiracies in this case because "[t]he evidence overwhelmingly established the existence of a single conspiracy." *Id.* at 13a.

Contrary to petitioner's contention (Pet. 5-6, 8-9), these standards are not materially different from those applied in other circuits. When a court determines that evidence "overwhelmingly establishe[s]" a single conspiracy, it has effectively found that a reasonable jury could not have concluded otherwise. Thus, the denial of petitioner's request for a multiple conspiracies instruction was entirely consistent with standards applied in other circuits. See, *e.g.*, *United States* v. *Linn*, 862 F.2d 735, 743-744 (9th Cir. 1988); *United States* v. *Wilkinson*, 754 F.2d 1427, 1434 (2d Cir.), cert. denied, 472 U.S. 1019 (1985); *United States* v. *Martino*, 665 F.2d 860, 875-877 (2d Cir. 1981), cert. denied, 458 U.S. 1110 (1982);

United States v. *Burrenson*, 643 F.2d 1344, 1348 (9th Cir.), cert. denied, 454 U.S. 830, 847 (1981).

Petitioner's suggestion (see Pet. 3-4, 8) that the court of appeals overlooked evidence supporting the existence of multiple conspiracies presents no question warranting this Court's review. The evidence established that petitioner was an active participant, along with Soriano and Davis, in drug transactions that occurred before the point when, according to petitioner, his conspiratorial relationship with Soriano began. Soriano testified that, in December 1985, Davis sent petitioner to Miami to negotiate with Soriano and another individual concerning the purchase of ten kilograms of cocaine. Pet. App. 2a. In April 1986, Soriano met with both petitioner and Davis in an effort to collect money for cocaine delivered in March 1986. *Id.* at 3a; Gov't C.A. Br. 16. Also in April, Davis sent petitioner to Los Angeles to pick up six kilograms of cocaine from Soriano. Pet. App. 3a. Thereafter, Fue delivered money from petitioner or Davis to Soriano or his sources; on one occasion, in a trip paid for by Davis, Fue was accompanied by petitioner. *Ibid.*; Gov't C.A. Br. 17, 30.

In May, Soriano, Davis, and petitioner met and argued over who, as between Davis and petitioner, was responsible for shortfalls in payments to Soriano for drug shipments up to that point. During that meeting, when Soriano told Davis to give petitioner cocaine remaining from a prior shipment so that it could be sold, petitioner stated that "he had been selling all the drugs for Mr. Davis anyway and that he would go ahead and take it and get rid of it and make sure Mr. Soriano got his money." Gov't C.A. Br. 30. In view of this evidence, the court of appeals was correct in its conclusion that the evidence over-

whelmingly established a single conspiracy. As the court explained, the fact that Soriano came to deal more directly with petitioner as he became disenchanted with Davis "hardly [meant] that the scheme that had started in November 1985 ended and a new conspiracy began." Pet. App. 12a. That evidence did not indicate that "the objective of the scheme as originally agreed to [was] completed, abandoned, renounced, or otherwise terminated"; rather, as the court explained, petitioner and Soriano "simply continued, albeit in closer association, their longstanding efforts to bring cocaine to Kansas City." *Ibid.*

2. Petitioner also contends (Pet. 9-10) that there is a conflict among the circuits on the question whether the commission of an overt act is an element of a drug conspiracy punishable under 21 U.S.C. 846.

Notwithstanding conflicting statements in some early decisions, virtually all courts of appeals have now concluded that a conspiracy under the Controlled Substances Act does not require either an allegation or proof of an overt act. *United States* v. *Savaiano*, 843 F.2d 1280, 1293-1294 (10th Cir.), cert. denied, 109 S. Ct. 99 (1988); *United States* v. *Pumphrey*, 831 F.2d 307, 308-309 (D.C. Cir. 1987); *United States* v. *Bey*, 736 F.2d 891, 893-895 (3d Cir. 1984); *United States* v. *Dempsey*, 733 F.2d 392, 394-396 (6th Cir.), cert. denied, 469 U.S. 983 (1984); *United States* v. *Russell*, 703 F.2d 1243, 1250 (11th Cir. 1983); *United States* v. *Rodriguez*, 612 F.2d 906, 919-920 n.37 (5th Cir. 1980) (en banc), aff'd, 450 U.S. 333 (1981); *United States* v. *Knuckles*, 581 F.2d 305, 311 (2d Cir.), cert. denied, 439 U.S. 986 (1978); *United States* v. *Umentum*, 547 F.2d 987, 989-991 (7th Cir. 1976), cert. denied,

430 U.S. 983 (1977); *United States* v. *DeJesus*, 520 F.2d 298, 301 (1st Cir.), cert. denied, 423 U.S. 865 (1975).

The plain language of Section 846 compels that conclusion. Unlike the general federal conspiracy statute, 18 U.S.C. 371, Section 846 does not require the commission of an overt act as an element of the offense. Rather, it is unlawful to "conspire[] to commit any offense" defined elsewhere in the Act. Congress has thus chosen to model the drug statute after the common law, which did not require proof of an overt act for a conviction for conspiracy. See, *e.g.*, *United States* v. *Bey*, 736 F.2d at 894-895 & n.5; *United States* v. *Dempsey*, 733 F.2d at 395.*

Although there are statements in decisions by the Ninth Circuit suggesting that the performance of an overt act is an element of a violation of Section 846, *United States* v. *Melchor-Lopez*, 627 F.2d 886 (1980); *United States* v. *Tavelman*, 650 F.2d 1133, cert. denied, 455 U.S. 939 (1982), there is no conflict among the courts of appeals calling for this Court's review. Those statements were plainly dicta. In *Melchor-Lopez*, the issue was whether the government had introduced sufficient evidence to prove that a defendant had entered an unlawful agreement with the alleged co-conspirators, and the court thus had no occasion to consider whether his conviction could have been upheld in the absence of proof of

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* Petitioner is mistaken in his assertion (Pet. 9-10) that "the very meaning of the word conspiracy under federal common law implies the requirement of an overt act." Under the common law, it was established that the performance of an overt act was not an element of the offense of conspiracy. *Singer* v. *United States*, 323 U.S. 338, 340 (1945); *Hogan* v. *O'Neill*, 255 U.S. 52, 55 (1921); *Nash* v. *United States*, 229 U.S. 373, 378 (1913).

an overt act. Similarly, in *Tavelman*, the issue was whether a defendant could receive separate sentences for participating in a drug conspiracy and for violating the Travel Act, 18 U.S.C. 1952. Applying the *Blockburger* test, the court concluded that separate sentences could be imposed because "[t]he interstate element of section 1952 is not required under section 846 and the agreement element of section 846 is not required under section 1952." 650 F.2d at 1140. It was thus immaterial whether or not an overt act was an element of a conspiracy punishable under Section 846.

The Ninth Circuit is likely to join other courts of appeals in holding that an overt act is not required for a conviction under Section 846 if it is called upon to resolve that question. The Ninth Circuit consistently held that Section 846's predecessor did not require an allegation or proof of an overt act. See *United States* v. *Murray*, 492 F.2d 178, 192 (1973), cert. denied, 419 U.S. 854 (1974); *Hopkins* v. *United States*, 405 F.2d 770, 772 n.2 (1969); *Ewing* v. *United States*, 386 F.2d 10, 15 (1967), cert. denied, 390 U.S. 991 (1968); *Leyvas* v. *United States*, 371 F.2d 714, 717 & n.4 (1967). Moreover, early decisions in a number of other circuits contained suggestions that an overt act was a prerequisite for a conviction under Section 846. All of those courts, however, ultimately resolved the uncertainty in their decisions against the position that petitioner advocates. See, *e.g.*, *United States* v. *Covos*, 872 F.2d at 809-810; *United States* v. *Rodriguez*, 612 F.2d at 919 n.37; *United States* v. *Dempsey*, 733 F.2d at 395-396; *United States* v. *Savaiano*, 843 F.2d at 1293-1294. Absent any indication that the Ninth Circuit would adhere to dicta in its cases in the face of the present consensus that an overt act is not an

element of a violation of Section 846, that question does not warrant this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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